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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FRANK J. MUSCARELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)(1), which imposes a five-year prison term upon anyone who "carries" a weapon during and in relation to any drug-trafficking crime, is violated when a defendant knowingly possesses a firearm in the locked glove compartment of a truck, but could not readily access the firearm during the commission of the underlying crime.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were Frank J. Muscarello, as Defendant-Appellee, and the United States of America, as Appellant.

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PETITION FOR A WRIT OF CERTIORARI

Frank J. Muscarello respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 106 F.3d 636, and is reprinted at pages 1a-7a of the appendix to this petition. The opinion of the United States District Court for the Eastern District of Louisiana, granting petitioner's motion to quash or dismiss count 3 of the indictment against him, is not officially reported, although it is available at 1996 WL 173374, and is reprinted at pages 8a-11a of the appendix to this petition. The district court's opinion denying the government's motion for reconsideration is unreported; it is reprinted at pages 12a-13a of the appendix to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 13, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

Section 924(c)(1) of Title 18, United States Code, provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection,

such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

STATEMENT

This case presents an important issue of federal criminal law: the meaning of the phrase "carries a firearm," as used in 18 U.S.C. § 924(c)(1). This is a question on which the courts of appeals are hopelessly divided.

1. Petitioner Frank J. Muscarello was arrested by federal agents on December 8, 1994, for violation of federal drug statutes. At the time of his arrest, petitioner acknowledged to the arresting officers that he had a .38 caliber handgun located in the locked glove compartment of his truck. App. 8a.

2. In May 1995, pursuant to a plea agreement, petitioner pleaded guilty to conspiracy to distribute marijuana and distribution of marijuana. *See* 21 U.S.C. §§ 841(a)(1), 846. Petitioner also pleaded guilty to count 3 of the indictment against him, which charged him with "using and carrying" a firearm in relation to those crimes, pursuant to 18 U.S.C. § 924(c)(1). App. 2a, 9a, 12a. In pertinent part, the factual basis for petitioner's guilty plea, which was prepared by the government and signed by petitioner's lawyer, was the following:

> Located inside the glove compartment of the Defendant Muscarello's Ford truck was a loaded firearm which the Defendant knowing possessed in his vehicle and carried for protection in relation the above described drug trafficking offense. [*sic*]

App. 2a, 9a, 12a. It was no surprise that petitioner had a gun in his locked glove compartment: Since 1954, petitioner had held a variety of law-enforcement positions, including constable, chief of police, and — at the time of his arrest — a bailiff in the 21st Judicial District Courthouse, employed by the Tangipahoa Parish Sheriff's office. App. 3a, 10a.

3. After his guilty plea, but prior to sentencing, this Court decided *Bailey v. United States*, 116 S. Ct. 501 (1995). In *Bailey*, this Court held that the term "uses . . . a firearm" in § 924(c)(1) must be given its ordinary and natural meaning, as understood in the context of that statute — not "possession alone" or "mere possession" but "active employment of the firearm." *Id.* at 506. Looking to dictionary definitions of "use," this Court concluded that standing alone, "these various definitions of 'use' imply action and implementation." *Id.* Looking then to the context in which the term "use" appears in § 924(c)(1), the Court concluded that "use" could not be read as broadly as the government had advocated, for such a reading would "undermin[e] virtually any function for 'carry,'" the other firearm-related act that would violate § 924(c)(1). *Id.* at 507. As the Court explained:

> [A] more limited, active interpretation of "use" preserves a meaningful role for "carries" as an alternative basis for a charge. Under the interpretation we enunciate today, a firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, *e.g.*, when an offender keeps a gun hidden in his clothing throughout a drug transaction.

Id.

4. In view of *Bailey*, Muscarello filed a motion to quash or dismiss count 3 of the indictment, pursuant to FED. R. CRIM. P. 12(b)(2). The government conceded that, after *Bailey*, petitioner's conviction "could no longer rest on the previously valid, alternative basis for his conviction, i.e., that he 'used' the firearm

in connection with the drug deal."[1] The government maintained, nonetheless, that petitioner had still "carried" the gun, as he had acknowledged by his guilty plea. App. 9a.

5. The district court granted petitioner's motion and dismissed count 3 of the indictment against him. App. 11a. While noting the "not very eloquen[t]" factual basis prepared by the government for petitioner's guilty plea hearing (App. 9a), the district court relied on additional facts, found in the pre-sentence report prepared by the United States Probation Office, that established that "defendant did not knowingly possess the firearm *in relation* to a drug trafficking crime," but "in furtherance of his job requirements and not for active employment in the charged transaction." App. 10a (emphasis in original).

6. The government filed a motion for reconsideration in the district court, which was denied. The government urged that petitioner, by admitting to the government's factual basis for his guilty plea, had "acquiesced in and admitted to" carrying a firearm in relation to a drug-trafficking offense. App. 12a. The district court noted that "[t]his is true, but the Court notes that this is a pre *Bailey* composition by the government and a pre *Bailey* consideration by defendant and his counsel." *Id.* The district court thus concluded that petitioner "did *carry* a firearm in the locked glove compartment of his vehicle, but not *in relation* to the commission of a drug trafficking crime." App. 13a (emphasis added).

7. The government appealed the district court's determination to the Fifth Circuit, which reversed, *per curiam*. The Fifth Circuit held that the district court had committed "two errors of law" in reaching its decision to dismiss count 3 of the indictment. App. 5a.

a. The first error identified by the court of appeals involved the question of whether *Bailey*, which dealt with the "use" prong of § 924(c)(1), had any relevance to a conviction under the

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[1] Gov't C.A. Br. at 8 n.2.

"carries a firearm" prong of that statute. Noting the district court's characterization of the factual basis for petitioner's guilty plea as "a 'pre-*Bailey* composition by the government and a pre-*Bailey* consideration by Defendant and his counsel'" (App. 5a), the court of appeals called the district court's reliance on *Bailey* "a legal non sequitur"; since "*Bailey* did not address the carrying facet of § 924(c), our prior jurisprudence on carrying remains applicable." App. 4a-5a. Following Fifth Circuit precedent,[2] the court of appeals held that petitioner's conviction could be upheld so long as the firearm was "possess[ed]" anywhere in petitioner's truck: "[T]he 'carrying' requirement of § 924(c) is met if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking crime." *Id.* (citations and internal quotations omitted).

b. The second legal error identified by the Fifth Circuit involved not the "carry" aspect of § 924(c)(1), but the "in relation to any . . . drug trafficking crime" aspect of that statute. The district court, relying on the probation office's pre-sentence report, had held that petitioner's possession of the gun was "in furtherance of his job requirements," not "*in relation* to a drug trafficking crime." App. 10a (emphasis in original). The court of appeals held that the district court should not have relied upon petitioner's "self-serving declaration" in the pre-sentence report "regarding his subjective intent in possessing the pistol in the truck." App. 5a. According to the court of appeals, the district court erroneously "allowed the PSR to supplant the formal plea agreement." *Id.*

c. In conclusion, the Fifth Circuit noted that *Bailey* "did nothing to invalidate our pre-*Bailey* "carrying" jurisprudence, at least as to those instances of drug trafficking that involve the use of motor vehicles in which firearms are possessed." App. 5a.

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[2] *United States v. Rivas*, 85 F.3d 193, 195 (5th Cir.), *cert. denied*, 117 S. Ct. 593 (1996), and *United States v. Pineda-Ortuno*, 952 F.2d 98, 104 (5th Cir.), *cert. denied*, 504 U.S. 928 (1992).

Thus, the court concluded, "the fact that the glove compartment was locked does not prevent conviction." App. 6a.

REASONS FOR GRANTING THE WRIT

This case presents a significant and recurring issue left open by this Court in *Bailey v. United States*, 116 S. Ct. 501 (1995): the proper construction of the phrase "carries a firearm" as used in 18 U.S.C. § 924(c)(1). In the sixteen months since *Bailey* was decided, a serious conflict has developed in the courts of appeals, which have rendered well over four dozen decisions addressing the issue. Five circuits, including the Fifth Circuit in this case, hold that the mere possession or transportation of a firearm in a motor vehicle constitutes "carrying," while three circuits hold that "carrying" a firearm under § 924(c)(1) requires that the firearm in the vehicle be "immediately accessible" to the defendant. Had petitioner been charged with violating 18 U.S.C. § 924(c)(1) in a district court within these latter three circuits, he necessarily would have been acquitted, since the gun in question was locked in a glove compartment, and thus was not "immediately accessible." Because of the serious conflict among the circuits, and because the issue is indisputably an important one, review by this Court should be granted.

I. THE COURTS OF APPEALS ARE HOPELESSLY DIVIDED WITH RESPECT TO THE CONSTRUCTION OF 18 U.S.C. § 924(c)(1)'s "CARRIES A FIREARM" REQUIREMENT

Section 924(c)(1) of Title 18, United States Code, imposes a mandatory five-year prison term when the defendant "uses or carries a firearm" "during and in relation to any crime of violence or drug trafficking." This Court has already resolved the proper interpretation of one of the two key phrases in § 924(c)(1). In *Bailey v. United States*, this Court unanimously held that a defendant "uses" a firearm only when he "actively employ[s]" the firearm, as by brandishing or referring to it. 116 S. Ct. at 509. In *Bailey*, this Court rejected the D.C. Circuit's ruling that the defendant had "used" a firearm by transporting it in the locked trunk of his car, and remanded for consideration of

whether the defendant could nonetheless be convicted for having "carried" the gun. This case presents the Court with the opportunity to resolve the remaining key phrase of § 924(c)(1) — "carries a firearm."

"The circuits are split on the issue of whether a weapon that is aboard a moving vehicle must be immediately accessible to the defendant in order to support a 'carrying' conviction under § 924(c)(1)." *United States v. Cooke*, No. 96-1852, 1997 WL 166290, at *8 (7th Cir. April 9, 1997). The conflict among the courts of appeals was recently summarized by the First Circuit, which "agree[d] with the Fourth, Seventh and Tenth Circuits that a gun may be 'carried' in a vehicle for the purposes of § 924(c)(1) without necessarily being immediately accessible to the defendant while it is being transported." *United States v. Cleveland*, 106 F.3d 1056, 1066 (1st Cir. 1997) (citing *United States v. Mitchell*, 104 F.3d 649, 652-53 (4th Cir. 1997); *United States v. Molina*, 102 F.3d 928, 930-32 (7th Cir. 1996); *and United States v. Miller*, 84 F.3d 1244, 1256-61 (10th Cir.), *cert. denied*, 117 S. Ct. 443 (1996)). Like these courts, the Fifth Circuit in this case held that § 924(c)(1) does not require proof of "immediate accessibility." App. 4a-5a.

On the other hand, the court in *Cleveland* "recognize[d] that the Second, Sixth and Ninth Circuits have taken a contrary position, requiring that the firearms be immediately accessible." 106 F.3d at 1068 (citing *United States v. Staples*, 85 F.3d 461, 464 (9th Cir.), *cert. denied*, 117 S. Ct. 318 (1996); *United States v. Giraldo*, 80 F.3d 667, 677-78 (2d Cir.), *cert. denied*, 117 S. Ct. 135 (1996); *and United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir.), *cert. denied*, 117 S. Ct. 136 (1996)). *See also United States v. Nelson*, No. 96-3103, 1997 WL 149200, at *3 (8th Cir. April 2, 1997) ("We will assume, without deciding,

that ready availability of the firearm is required for a 'carry' conviction in this Circuit.").[3]

This conflict over the meaning of "carry" results in precisely the inconsistent jurisprudence that this Court's certiorari power is designed to address. Indeed, an individual's exposure to criminal prosecution under § 924(c)(1) (and the accompanying five-year prison sentence) will in many instances depend entirely on where the case arises. Nowhere is this more apparent than in the present case. It is undisputed, as both the district court and court of appeals noted, that petitioner was convicted for possessing a firearm in the glove compartment of his truck, which by all indications was locked. App. 2a, 8a. According to the court of appeals in this case, however, it was legally irrelevant whether the firearm was readily accessible to petitioner, for the Fifth Circuit holds that when "the defendant knowingly possesses a firearm in a motor vehicle and uses the vehicle during the commission of the underlying crime, then *as a matter of law* the firearm is carried during a drug-trafficking offense for purposes of § 924(c)." App. 6a (emphasis added). Under that approach, "the fact that the glove compartment was locked does not prevent conviction." App. 6a.

In the three circuits that construe "carry" to require immediate accessibility of the firearm, the judgment below would unquestionably have been different. Under the Second Circuit's approach, exemplified by *United States v. Cruz-Rojas*, 101 F.3d 283 (2d Cir. 1996), the court of appeals would have, at the very least, remanded for an evidentiary determination of whether the firearm was immediately accessible to petitioner. In *Cruz-Rojas*, the two defendants pleaded guilty to federal drug crimes, and to "aiding and abetting each other in knowingly using and carrying a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2." *Id.* at 283. Just as in

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[3] For other decisions acknowledging the conflict, see, *e.g.*, *United States v. Mitchell*, 104 F.3d 649, 653 (4th Cir. 1997), and *United States v. Molina*, 102 F.3d 928, 930 (7th Cir. 1996).

this case, the defendants in *Cruz-Rojas* pleaded guilty to "knowingly us[ing] and carry[ing] a firearm." *Id.* at 284. Recognizing that in light of *Bailey*, "a pivotal aspect of the applicable law changed after the defendants entered their pleas of guilt," *id.* at 285, the Second Circuit concluded that the defendants' guilty pleas could not stand "insofar as [they were] based on *use* of a firearm." *Id.* at 284 (emphasis in original). Turning to the possibility that their guilty pleas could be sustained under the "carry" prong of § 924(c)(1), the Second Circuit concluded that "the government's recital of what it was prepared to prove offered no substantial basis for an inference that, at the time [defendants] were apprehended, the gun was within the reach of [either defendant]." *Id.* at 286. The firearm, according to the factual basis for the guilty pleas, was located in a compartment under the car's dashboard. The Second Circuit held that the record provided it "with no information on whether the gun's positioning under the dashboard in fact provided easy access either to the driver or to the passenger." *Id.* at 286. The court therefore remanded for "an evidentiary hearing on whether the gun found under the dashboard was accessible." *Id.*

Another Second Circuit decision, *United States v. Giraldo*, 80 F.3d 667, makes the conflict even more manifest. In *Giraldo*, the gun was located in a secret compartment in an automobile that contained several passengers, each of whom was convicted for "carrying" a firearm in connection with a drug-trafficking crime under § 924(c)(1). *Id.* at 672. On appeal after a jury trial, the Second Circuit carefully distinguished between the individual defendants based on whether they had immediate access to the firearm; the court affirmed the § 924(c)(1) convictions only as to those defendants that did in fact have such immediate access, and reversed as to the remaining defendants. *Id.* at 676-77. Under the Fifth Circuit's broad-brush approach, all of the convictions in *Giraldo* would have been affirmed.

Similarly, in *United States v. Malcuit*, 104 F.3d 880 (6th Cir. 1997), the defendant was convicted for "carrying" a gun in violation of § 924(c)(1), based on the presence of an unloaded firearm located in a bag in the back seat of the car. The Sixth

Circuit held that the record evidence regarding the proximity of the defendant to the firearm was "not particularized enough for this court to determine whether the firearm would have been 'within effortless reach.'" *Id.* at 885-86. It therefore remanded the case to allow the district court to evaluate that issue. *Id.*

In direct conflict with these rulings are the numerous cases that apply the standard utilized by the Fifth Circuit in this case, and affirm convictions under § 924(c)(1), based on the defendant's mere transportation or possession of a firearm.[4] *See also United States v. Moore*, No. 95-5586, 107 F.3d 868, 1997 WL 71707 (4th Cir. Feb. 20, 1997) (*per curiam*) (affirming conviction without even mentioning where in vehicle firearm was); *United States v. Ruth*, 100 F.3d 111 (10th Cir. 1996) (same).

The present case illustrates this conflict. Even putting aside the district court's reliance on the pre-sentence report,[5] the plea colloquy itself still would not establish "a factual basis for the plea" (FED. R. CRIM. P. 11(f)) of "carrying a firearm," under the "immediate accessibility" approach that governs in the Second, Sixth, and Ninth Circuits. Under that approach, the result here should have been either affirmance of the district court's dismissal of count 3 of the indictment, *compare Giraldo*, 80 F.3d at 676-77, or at the very least, as in *Cruz-Rojas*, a remand for "an

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[4] *See, e.g., United States v. Sherman*, 106 F.3d 394 (4th Cir. 1997) *(per curiam)* (affirming § 924(c)(1) "carry" conviction where, as here, the gun was located in a glove compartment); *United States v. Cleveland*, 106 F.3d 1056 (1st Cir. 1997) (affirming conviction where the firearm was located in the vehicle's trunk — obviously not "immediately accessible"). The First and Seventh Circuits have reached the same result when the firearm was in a closed secret compartment. *United States v. Molina*, 102 F.3d 928; *United States v. Ramirez-Ferrer*, 82 F.3d 1149 (1st Cir.), *cert. denied*, 117 S. Ct. 405 (1996).

[5] The district court's reliance on the pre-sentence report went solely to the "in relation to any crime of . . . drug trafficking" requirement of § 924(c)(1), and not to the "carrying" requirement of that statute that is at issue here. App. 10a.

evidentiary hearing on whether the gun . . . was accessible to . . . the defendan[t]." 101 F.3d at 286.[6] The Fifth Circuit here was able to conclude that there was an adequate factual basis for petitioner's guilty plea only by holding that a firearm is "carried" for purposes of § 924(c)(1) whenever it is possessed within a motor vehicle, even if the firearm is locked away in the glove compartment. App. 4a-5a.

II. THE QUESTION PRESENTED BY THIS CASE IS IMPORTANT AND RECURRING

As the Solicitor General recently told this Court, "18 U.S.C. § 924(c) is an important and widely used statute." Petition for Certiorari, *United States v. Gonzales*, No. 95-1605, at 7. In *Bailey*, this Court similarly acknowledged that "§ 924(c)(1) has been the source of much perplexity in the courts." 116 S. Ct. at 505. Its broad applicability — and widespread use by the government — can be seen in the sheer number of decisions, post-*Bailey*, to have addressed the question presented here.[7]

So, too, the necessity for this Court's review is confirmed by the divergence of judicial views regarding the interpretation of § 924(c)(1)'s "carrying" requirement. As the Seventh Circuit has recently noted, "[t]he term 'carries' as used in § 924(c)(1) is not one that has yielded to precise definition. Over seven years ago,

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[6] If an "immediate accessibility" standard were to prevail, petitioner's conviction under § 924(c)(1)'s "carry" prong might then be reversed by this Court as a matter of law, since the government has never disputed that the glove compartment of petitioner's truck was locked. Alternatively, the case might be remanded to the district court for an evidentiary hearing to determine the accessibility of the gun to petitioner.

[7] Since this Court's December 1995 decision in *Bailey v. United States*, most of the circuits have decided at least one if not several cases involving the construction of § 924(c)(1)'s "carry" requirement. A list of such decisions is presented at pages 14a-17a of the appendix to this petition.

a panel of this Court observed that 'defining the scope of the statutory term "carries" . . . has not been an easy task for our colleagues in other circuits.' Unfortunately, the passage of time has not brought much clarity to the issue." *United States v. Cooke*, 1997 WL 166290, at *5 (quoting *United States v. Edun*, 890 F.2d 983, 988 (7th Cir. 1989)). As outlined above, the courts of appeals are hopelessly divided, and there is thus no need for further percolation of the issue in the lower courts.

Finally, the proper construction of § 924(c)(1) is obviously important to individual defendants such as petitioner. Petitioner, who is currently 71 years old, faced a guidelines-computed sentence of 6 to 12 months' imprisonment for the two substantive drug violations to which he pleaded guilty. *See* Pre-Sentence Report at 10 (June 14, 1996). By contrast, the penalty for violation of § 924(c)(1) is at least five years' imprisonment. It is critical that § 924(c)(1) be applied uniformly throughout the Nation.

III. THE DECISION BELOW WAS CLEARLY WRONG

The Fifth Circuit, relying on what it called its "pre-*Bailey* 'carrying' jurisprudence" (App. 5a), held that "[w]hen . . . the defendant knowingly possesses a firearm in a motor vehicle and uses the vehicle during the commission of the underlying crime, then *as a matter of law* the firearm is carried during a drug-trafficking offense for purpose of § 924(c)." App. 6a (emphasis added). This sweeping approach, under which mere possession or transportation equals "carrying," was manifestly erroneous.

Three Justices of this Court — Justices Scalia, Stevens, and Souter — have noted that "carrying a firearm" in the context of § 924(c)(1) "means *carrying it in such manner as to be ready for use as a weapon*." *Smith v. United States*, 508 U.S. 223, 245-46 (1993) (Scalia, J., dissenting) (emphasis added). This construction of § 924(c)(1)'s "carry" requirement would seem to foreclose a conviction where a firearm is locked away in a glove compartment. Similarly, then-Chief Judge Breyer has previously stated that "the ordinary meanings of the words 'use' *and 'carry'* . . . connote *activity beyond simple possession*." *United States v.*

McFadden, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting) (emphasis added). Justice Breyer's view of the proper meaning of "carry," which was cited by this Court in *Bailey*, 116 S. Ct. at 506, is also at odds with the "knowingly possesses" standard adopted by the Fifth Circuit and applied in this case. App. 4a.

Similarly, this Court's unanimous decision in *Bailey* casts serious doubt upon the construction adopted by the Fifth Circuit in this case. The term "carries a firearm," like the term "uses a firearm," "must be given its 'ordinary or natural' meaning," construed in light of "its placement and purpose in the statutory scheme." *Bailey*, 116 S. Ct. at 506 (quoting *Smith*, 508 U.S. at 228). In *Bailey*, even though the question of what constitutes "carrying a firearm" was not strictly before this Court, the statutory interrelationship between "use" and "carry" occasioned this discussion:

> Under the interpretation we enunciate today, a firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm *without handling it*; and a firearm can be carried without being used, *e.g.*, when an offender keeps a gun hidden in his clothing throughout a drug transaction.

116 S. Ct. at 507 (emphasis added).

These examples suggest that the court of appeals' interpretation of "carries a firearm" was far too broad. Certainly, this Court in *Bailey* was applying an "ordinary or natural" meaning to the term when it explained that an offender who displays a firearm "without handling it" does not carry the firearm. Justices Scalia, Stevens, and Souter were similarly utilizing the ordinary meaning of "carrying a firearm," "in the context" of § 924(c)(1), when they concluded that it "means carrying it in such manner as to be ready for use as a weapon." *Smith*, 508 U.S. at 245-46. But petitioner's possession of a firearm in his locked glove compartment satisfies neither of these ordinary understandings of "carrying a firearm" — petitioner neither "handled" the firearm nor

possessed it "in such manner as to be ready for use as a weapon."[8]

Indeed, dictionary definitions suggest that to "carry" a firearm means something much more limited than mere possession in a vehicle — namely, to "have the firearm on one's person." Thus, to "carry arms or weapons" means "[t]o wear, bear, or carry them *upon the person or in the clothing or in a pocket,* for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." BLACK'S LAW DICTIONARY 194 (5th ed. 1979) (emphasis added). *See also* II THE OXFORD ENGLISH DICTIONARY 921 (2d ed. 1989) (when the object of "carry" is a weapon, such as "to carry arms," "carry" means "[t]o bear, wear, hold up, or sustain, as one moves about; habitually to bear about with one (e.g. any ornament, ensign, personal adjunct; also a name or other distinction)"). Finally, any possible ambiguity in the term "carry" would have to be resolved in petitioner's favor in light of the rule of lenity, which "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier,* 117 S. Ct. 1219, 1225 (1997). *See also Smith,* 508 U.S. at 246-47 (Scalia, J., dissenting); *Adamo Wrecking Co. v. United States,* 434 U.S. 275, 284-85 (1978); *United States v. Bass,* 404 U.S. 336, 348 (1971).

In short, the decision below is erroneous and should be reversed.

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[8] Likewise, the Court's example in *Bailey* of what *does* constitute "carrying" a firearm — "keep[ing] a gun hidden in his clothing" — suggests a statutory construction requiring either "handling" (*Bailey v. United States,* 116 S. Ct. 501, 507 (1995)) or immediate accessibility, so "as to be ready for use as a weapon." *Smith v. United States,* 508 U.S. 223, 246 (1993) (Scalia, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 18, 1997

APPENDIX

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT.

UNITED STATES of America, Plaintiff-Appellant,

v.

Frank J. MUSCARELLO, Defendant-Appellee.

No. 96-30591
Summary Calendar.

Feb. 13, 1997.

Stephen A. Higginson, Asst. U.S. Atty, New Orleans, LA, for plaintiff-appellant.

Ron S. Macaluso, John Garrison Jordan, Seale, Macaluso, Daigle & Ross, Hammond, LA, for defendant-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before HIGGINBOTHAM, WIENER AND BENAVIDES, Circuit Judges.

PER CURIAM:

In this direct criminal appeal, the government asks us to reverse the district court's dismissal of one count in a multi-count indictment to which Defendant-Appellee Frank J. Muscarello had pled guilty. Count Three charged Muscarello with knowingly using and carrying a firearm in relation to a drug-trafficking offense, in violation of 18 U.S.C. § 924(c)(1). Based on the presentence report (PSR), the court dismissed Count Three, to which Muscarello had already pled guilty and on which he had

already been convicted. Agreeing with the government that the district court erred in dismissing the firearms count, we reverse and remand for further proceedings consistent with this opinion.

I

FACTS AND PROCEEDINGS

Pursuant to a plea agreement, Muscarello pleaded guilty in May 1995 to drug charges and to "using and carrying" a firearm in relation to those crimes. The factual basis for the guilty plea, which was signed for approval by Muscarello's attorney, established that "[l]ocated inside the glove compartment of the Defendant Muscarello's Ford truck was a loaded firearm which the Defendant knowing [sic] possessed in his vehicle and *carried* for protection *in relation* to the above described drug trafficking offense" (emphasis added). Muscarello did not object to the factual basis supporting his convictions.

After Muscarello was thus convicted but prior to his being sentenced, the United States Supreme Court rendered its decision in *Bailey v. United States*,[1] significantly narrowing the "use" facet of § 924(c) (but not addressing the "carrying" facet). This prompted Muscarello to file a motion under Fed.R.Crim.P. 12(b)(2) to quash or dismiss the firearm count.[2] After holding a hearing on Muscarello's motion, the district court granted it, dismissing and quashing Count Three. In so doing, the district court chose no longer to credit the factual basis presented by the government and concurred in by Muscarello, but instead to switch its reliance exclusively to the following two paragraphs from Muscarello's post-conviction PSR:

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[1] —U.S.—, 116 S. Ct. 501, 133 L.Ed. 2d 472 (1995).

[2] Notwithstanding Muscarello's argument to the contrary, it is of no moment that the indictment charged that Muscarello carried "and" used a firearm rather than that he carried "or" used a firearm. *See United States v. Pigrum*, 922 F.2d 249, 253 (5th Cir.), *cert. denied*, 500 U.S. 936, 111 S. Ct. 2064, 114 L.Ed.2d 468 (1991) (a disjunctive statute may be pleaded conjunctively and proved disjunctively).

> As to the weapon, Muscarello does not deny his possession of the pistol. The pistol was in the glove compartment of his truck where it had been for a long period of time. He denies any conscious decision to carry the gun in relation to the marijuana sale, and stated that he carried in relation to his job with the Tangipahoa Parish Sheriff's office as balif[sic] at the courthouse in Amite.
>
> ....
>
> In 1954, [Muscarello] became constable of the 6th Ward of Tangipahoa Parish, a mostly rural area that included the farming community of Tickfaw. He held this position until 1958. In 1957 Tickfaw was incorporated, and Muscarello was elected Chief of Police in the town. He maintained both positions until his term as constable expired in 1958. Muscarello was the Chief of Police in Tickfaw until his retirement in 1987. From 1987 until his arrest on December 8, 1994, he was employed with the Tangipahoa Parish Sheriff's office, working as a bailiff in the 21st Judicial District Courthouse, Amite, Louisiana.

The court stated that "[t]he equities herein favor [Muscarello]" and concluded that Muscarello "did not knowingly possess *in relation* to a drug-trafficking crime," but that "[t]o the contrary, defendant, his employment background considered, knowingly possessed in the glove compartment of his vehicle in furtherance of his job requirements and not for active employment in the charged transaction."

The government moved for reconsideration but the district court d nied that motion despite its acknowledgment that Muscarello, "in the guilty plea colloquy, [had] acquiesced in and admitted to the government's factual basis[.]" The court went on to note that "this [was] a pre-*Bailey* composition by the government and a pre-*Bailey* consideration by defendant and his counsel." The court then quoted the foregoing paragraphs from Muscarello's PSR again, and repeated the conclusion that Muscarello "did *carry* a firearm in a locked glove compartment of his vehicle, but not *in relation* to the commission of a drug-

trafficking crime." The case is before us for review by virtue of the government's timely filing of a notice of appeal.[3]

II

ANALYSIS

To support a conviction under § 924(c), the evidence must prove that the Defendant (1) used or carried a firearm, (2) during and in relation to a drug-trafficking offense.[4] The government concedes that, after *Bailey*, the evidence in the instant case will not support a conviction for use under § 924(c). The government nevertheless contends that, as *Bailey* did not address the *carrying* facet of § 924(c), our prior jurisprudence on carrying remains applicable, and the factual basis is more than sufficient to support Muscarello's conviction for carrying the firearm. We agree. Our recent decision in *United States v. Rivas* recognizes that *Bailey* does not alter our prior precedent analyzing the "carrying" facet of § 924(c), at least when the gun is possessed in a motor vehicle.[5] Consequently, "the 'carrying' requirement of § 924(c) is met if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking

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[3] We have jurisdiction under 18 U.S.C. § 3731, which permits the government to appeal from "an order of the district court dismissing an indictment ... as to any one or more counts[.]" *See United States v. Mann*, 61 F.3d 326, 330-31 (5th Cir.), *cert. denied*, —U.S.— , 116 S. Ct. 434, 133 L.Ed.2d 349 (1995). Section 3731 gives the government 30 days in which to appeal, and here the government's motion to reconsider was filed within the 30-day period, extending the time in which to appeal and thus recommencing the running of the 30-day period on the date the government's motion was denied. *United States v. Brewer*, 60 F.3d 1142-1143 (5th Cir. 1995).

[4] 18 U.S.C. § 924(c).

[5] 85 F.3d 193, 195 (5th Cir.), *cert. denied*, —U.S.—, 117 S. Ct. 593, 136 L.Ed.2d 521 (1996).

crime."[6] Although none question that (1) the possession element of the carrying facet of § 924(c) was met by the uncontested fact that Muscarello knowingly possessed a loaded piston in the glove compartment of his truck, or (2) the gun was thus possessed "during" the commission of the drug-trafficking crime, the district court determined on the basis of the PSR that the "in relation to" element was not present. We conclude that the district court clearly erred in this determination, and did so as a result of two errors of law. First, the district court erred in discrediting and disregarding the factual basis concurred in by Muscarello, by characterizing it as a "pre-*Bailey* composition by the government and a pre-*Bailey* consideration by Defendant and his counsel." Although that might be a valid legal basis for disregarding the factual basis as to the use facet of § 924(c), it is a legal non sequitur when the carrying facet is under scrutiny. It follows that the court's disregard of the factual basis was legal error. Second, the court erred in relying on Muscarello's post-conviction self-serving declaration to the probation officer, recounted in the PSR, regarding his subjective intent in possessing the pistol in the truck that he used in facilitating his illicit drug trafficking. Under the circumstances of this case, the court should not have allowed the PSR to supplant the formal plea agreement, given the defendant's knowing and voluntary concurrence, and that of his counsel, in the clear and unambiguous factual basis for that plea.

III

CONCLUSION

The Supreme Court decision in *Bailey* addressed the *use* facet of § 924(c) but did not address the *carrying* facet. Although Bailey indirectly heightened the focus on the *carrying* facet of § 924(c) by narrowing the *use* facet, it did nothing to invalidate

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[6] *Id.* (quoting *United States v. Pineda-Ortuno*, 952 F.2d 98, 104 (5th Cir.), *cert. denied*, 504 U.S. 928, 112 S. Ct. 1990, 118 L.Ed.2d 587 (1992)).

our pre-*Bailey* "carrying" jurisprudence, at least as to those instances of drug trafficking that involve the use of motor vehicles in which firearms are possessed. We recognized in *United States v. Pineda-Ortuno*[7] that "[w]hen a vehicle is used, 'carrying' takes on a different meaning from carrying on a person because the means of carrying is the vehicle itself." Thus, for example, the fact that the glove compartment was locked does not prevent conviction.[8] This is not to say, however, that every time a gun is knowingly possessed in a vehicle and the vehicle is used during and in relation to the commission of a drug-trafficking crime, the firearm is, as a *per se* matter of law, carried *in relation to* a drug-trafficking offense for purposes of § 924(c). Albeit a rarity, it is at least conceivable for such a vehicle-contained gun to be *carried* "during" but not necessarily "in relation to" the offense.

When, as here, the defendant knowingly possesses a firearm in a motor vehicle and uses the vehicle during the commission of the underlying crime, then as a mater of law the firearm is carried during a drug-trafficking offense for purposes of § 924(c). It matters not that the government confected the factual basis in the instant case before the decision in *Bailey*, or that Muscarello's knowing and voluntarily agreement with the accuracy of the factual basis predated *Bailey*. Neither does it matter that, according to the PSR, Muscarello subjectively intended to possess the firearm in connection with his bailiffing job and not in connection with his drug-trafficking crime when he has already knowingly and voluntarily signed on to a plea agreement with a factual basis that expressly includes the "in relation to" element.

The district court erred both in disregarding the factual basis for Muscarello's guilty plea and in relying on the content of the PSR regarding Muscarello's subjective intention. As this reliance led the district court to err in dismissing Count Three of the

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[7] 952 F.2d 98 (5th Cir.), *cert. denied*, 504 U.S. 928, 112 S. Ct. 1990, 118 L.Ed.2d 587 (1992).

[8] *Id.* at 104.

indictment, we (1) reverse that dismissal, (2) reinstate Count Three of the indictment and Muscarello's conviction thereon pursuant to his guilty plea, (3) vacate the sentence imposed to the extent that Muscarello's guilt on the firearms charge was not considered in calculating the sentence, and (4) remand the case to the district court for reimposition of Muscarello's conviction on Count Three and for resentencing. In so doing, we observe that what constitutes "carrying" under § 924(c) when the firearm is possessed in the motor vehicle differs substantially from what constitutes carrying a firearm in a non-vehicle situation. Thus our pronouncements today regarding carrying a firearm should not be applied in a non-vehicle situation without closely scrutinizing the effects of this distinction and questioning charily whether our vehicle case jurisprudence is properly applicable to a non-vehicle case, and vice versa.

DISMISSAL REVERSED; DISMISSED COUNT AND CONVICTION THEREON REINSTATED; SENTENCE VACATED; and CASE REMANDED for resentencing.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA **CRIMINAL ACTION**
versus **NO. 95-2**
FRANK J. MUSCARELJ O **SECTION: "E"**

RULING ON
DEFENDANT'S MOTION TO QUASH
AND/OR DISMISS COUNT 3 OF THE INDICTMENT

Defendant, Frank J. Muscarello, was named in a three count indictment wherein Count 1 charged him with conspiracy to distribute marijuana, Count 2 with distribution of marijuana and Count 3 with possessing a .38 caliber revolver during a drug trafficking crime. On May 25, 1995 after entering into a plea agreement he pled guilty to all three counts. Sentence has not yet been imposed. Now, in view of the December, 1995 Supreme Court decision in *Bailey v. United States*, 116 S. Ct. 501, he moves to quash and/or dismiss Count 3. The government opposes the motion.

The facts are undisputed in this case. The defendant arranged and coordinated the delivery of approximately eight pounds of marijuana to an undercover Drug Enforcement Agency Special Agent and made these arrangements with the assistance of an undercover cooperating individual. At the time of the delivery of the marijuana and receipt of payment of delivery by the defendant, a .38 caliber weapon was in the locked glove compartment of his truck. At the time of his arrest he acknowledged his possession of the weapon and it was seized by the arresting officers. He told the arresting officers that he had the weapon in the glove compartment. At no time during the marijuana transactions did he show the weapon to the officers, mention that he had a weapon, brandish the weapon, or make any threats against the officers.

The question presented is whether Count 3 properly charges defendant with using or carrying a weapon as proscribed by 18

U.S.C. §924(c). The government apparently concedes that defendant did not "use" the weapon, but argues that defendant's reliance on *Bailey* as the basis to dismiss Count 3 is misplaced since the Supreme Court in *Bailey* explicitly did not address criminal liability under the "carry" prong of 18 U.S.C. §924(c). It further argues that under Fifth Circuit law, defendant was carrying the loaded firearm, as charged, when he drove his truck to the location of the illegal drug deal to secure payment for the delivery and ensure that the drug was delivered to the buyer. *United States v. Pineda-Ortuno*, 952 F. 2d 98 (5th Cir. 1992), *cert. denied*, 112 S. Ct. 1990 (1992). Under *Pineda-Ortuno*, a conviction under the "carry" prong of §924(c) (1) is supported by the evidence if (1) the firearm was in a motor vehicle; (2) the vehicle was operated by the defendant and (3) the operator of the vehicle knowingly possessed the firearm during and in relation to a drug-trafficking crime. 924 F. 2d at 104.

The government additionally argues that analyzing *Bailey's* interpretation of §924(c) as requiring a showing of some specific utility of the weapon in relation to the drug trafficking crime, an additional element which might be necessary to sustain the conviction is that the firearm had a role of some type in the offense, i.e. was not possessed incidentally, but for a purpose. The government further argues that in this case the undisputed purpose, acknowledged by the defendant in his factual basis, is that he carried the weapon in his vehicle during the commission of the drug trafficking crime for his protection.

The factual basis prepared, not very eloquently, by the government for use at the guilty plea hearing, quoted directly in part, states:

> Located inside the glove compartment of the defendant Muscarello's Ford truck was a loaded firearm which the defendant knowling possessed in his vehicle and carried for protection in relation the above described drug trafficking offense.

On the other hand, the Court, as has all counsel, has been provided with the formal presentence investigation report prepared by the U.S. Probation office after its review and analysis of the overall matter. In paragraph 16 of the report it is stated:

> As to the weapon, Muscarello does not deny his possession of the pistol. The pistol was in the glove compartment of his truck where it had been for a long period of time. He denies any conscious decision to carry the gun in relation to the marijuana sale, and stated that he carried it in relation to his job with the Tangipahoa Parish Sheriff's Office as a balif at the Courthouse in Amite.

The report further states in paragraph 42:

> In 1954, he become constable of the 6th Ward in Tangipahoa Parish, a mostly rural area that included the farming community of Tickfaw. He held this position until 1958. In 1957 Tickfaw was incorporated, and Muscarello was elected Chief of Police in the town. He maintained both positions until his term as constable expired in 1958. Muscarello was the Chief of Police in Tickfaw until his retirement in 1987. From 1987 until his arrest on December 8, 1994, he was employed with the Tangipahoa Parish Sheriff's office, working as a baliff in the 21st Judicial District Courthouse, Amite, Louisiana.

Thus, considering the motion, the memoranda submitted by counsel, the record and the oral argument presented, the Court is of the opinion that the equities herein favor defendant. The Court rejects the government's *Pineda-Ortuno* argument, being of the opinion as respects the third criterion thereof, that defendant did not knowingly possess the firearm *in relation* to a drug-trafficking crime. To the contrary, defendant, his employment background considered, knowingly possessed the firearm in the glove compartment of his vehicle in furtherance of his job requirements and not for active employment in the charged transaction. Accordingly,

IT IS ORDERED that defendant's motion be GRANTED and that Count 3 of the indictment against him be QUASHED and DISMISSED.

New Orleans, Louisiana, April 10, 1996.

/s/ Marcel Livaudais, Jr.

MARCEL LIVAUDAIS, JR.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA **CRIMINAL ACTION**
versus **NO. 95-2**
FRANK J. MUSCARELLO **SECTION: "E"**

RULING ON GOVERNMENT'S MOTION REQUESTING RECONSIDERATION OF "QUASH AND/OR DISMISSAL" ORDER

The government moves the Court to reconsider its April 11, 1996 ruling "quashing/dismissing" Count 3 of the indictment against Frank J. Muscarello. For the following additional reasons the Court declines to do so.

Count 3 charges that defendant "did knowingly use and carry a firearm. . . . during and in relation to the commission of a drug trafficking crime. . ." We are concerned here only with the 'carry' prong, not the 'use' prong, of the charge.

The government strongly urges the court to reconsider its earlier ruling since defendant in the guilty plea colloquy, acquiesced in and admitted to the government's factual basis, particularly these words:

> Located inside the glove compartment of the defendant Muscarello's Ford truck was a loaded firearm which the defendant knowingly possessed in his vehicle and carried for protection in relation the above described drug trafficking offense.

This is true, but the Court notes that this is a pre *Bailey* composition by the government and a pre *Bailey* consideration by defendant and his counsel.

The Court further notes that its reference in its earlier ruling to paragraphs 16 and 42 of the presentence investigation report were not objected to by the government after having had an opportunity to do so. In paragraph 16 of the report it is stated:

> As to the weapon, Muscarello does not deny his possession of the pistol. The pistol was in the glove compartment of his truck where it had been for a long period of time. He denies any conscious decision to carry the gun in relation to the marijuana sale, and stated that he carried it in relation to his job with Tangipahoa Parish Sheriff's Office as a bailiff at the Courthouse in Amite.

The report further states in paragraph 42:

> In 1954, he became constable of the 6th Ward in Tangipahoa Parish, a mostly rural area that included the farming community of Tickfaw. He held this position until 1958. In 1957 Tickfaw was incorporated, and Muscarello was elected Chief of Police in the town. He maintained both positions until his term as constable expired in 1958. Muscarello was the Chief of Police in Tickfaw until his retirement in 1987. Form 1987 until his arrest on December 8, 1994, he was employed with the Tangipahoa Parish Sheriff' office working as a bailiff in the 21st Judicial District Courthouse, Amite, Louisiana.

All of this persuaded the Court to rule as it did in its earlier ruling and persuades the Court, considering the entirety of that ruling, to deny the government's request for reconsideration. Defendant did *carry* a firearm in the located glove compartment of his vehicle, but not *in relation* to the commission of a drug trafficking crime. Accordingly,

IT IS ORDERED that the government's motion for reconsideration be DENIED.

New Orleans, Louisiana, May 6, 1996.

/s/ Marcel Livaudais, Jr.

MARCEL LIVAUDAIS, JR.
United States District Judge

POST-*BAILEY* CASES ON § 924(c)(1)'S "CARRY" REQUIREMENT AND IMMEDIATE ACCESSIBILITY

Parentheticals indicate location of the firearm

Immediate accessibility required: 2d, 6th, 9th Circuits

United States v. Irvin, No. 95-1823, 107 F.3d 12, 1997 WL 49130 (6th Cir. Feb. 5, 1997) (*per curiam*) (under seat)

Wyley v. United States, No. 95-3784, 107 F.3d 12, 1997 WL 49073 (6th Cir. Feb. 3, 1997) (*per curiam*) (easily accessible in back of car)

United States v. Malcuit, 104 F.3d 880, (6th Cir. Jan. 21, 1997) (unloaded in back seat)

United States v. Davis, No. 95-50514, 106 F.3d 409, 1997 WL 14429 (9th Cir. Jan. 10, 1997) (easily accessible under seat or on floorboard)

Russel v. United States, 103 F.3d 130 (6th Cir. 1996) (under driver's seat)

United States v. Taylor, 102 F.3d 767 (6th Cir. 1996) (*per curiam*) (under seat)

United States v. Myers, 102 F.3d 227 (6th Cir. 1996) (under front seat)

United States v. Cruz-Rojas, 101 F.3d 283 (2d Cir. 1996) (in dash)

United States v. Lopez, 100 F.3d 98 (9th Cir. 1996) (in purse on floorboard)

United States v. Steinberg, 99 F.3d 1486 (9th Cir. 1996) (under driver and passenger seats)

Dempsey v. United States, No. 96-3335, 103 F.3d 129, 1996 WL 683588 (6th Cir. Nov. 22, 1996) (on defendant's person), *cert. denied*, 117 S. Ct. 1120 (1997)

United States v. Collins, No. 96-1203, 104 F.3d 354, 1996 WL 658733 (2d Cir. Nov. 12, 1996) (loose in passenger compartment)

United States v. Olds, No. 94-6286, 98 F.3d 1343, 1996 WL 557768 (6th Cir. Sept. 30, 1996) (*per curiam*) (unloaded in the rear seat)

United States v. Jackson, No. 95-5949, 97 F.3d 1453, 1996 WL 536418 (6th Cir. Sept. 19, 1996) (*per curiam*) (in trunk)

United States v. Mua, No. 95-30202, 97 F.3d 1462, 1996 WL 534054 (9th Cir. Sept. 19, 1996) (on passenger side in open bag), *cert. denied*, 117 S. Ct. 695 (1997)

United States v. Loaiza-Diaz, 96 F.3d 1335 (9th Cir. 1996) (under passenger seat)

United States v. Range, 94 F.3d 614 (11th Cir. 1996) (under floormat)

United States v. Robinson, No. 95-5171, 95 F.3d 1153, 1996 WL 490379 (6th Cir. Aug. 27, 1996) (*per curiam*) (under driver's seat), *cert denied*, 117 S. Ct. 716 (1997)

United States v. Willett, 90 F.3d 404 (9th Cir. 1996) (defendant admitted gun was easily accessible)

United States v. Staples, 85 F.3d 461 (9th Cir.) (in glove compartment), *cert. denied*, 117 S. Ct. 318 (1996)

United States v. Pimentel, 83 F.3d 55 (2d Cir. 1996) (in accessible secret compartment)

United States v. Baena-Gabriel, No. 94-50056, 91 F.3d 155, 1996 WL 368142 (9th Cir. June 28, 1996) (on passenger seat)

United States v. Matthews, No. 94-50630, 87 F.3d 1324, 1996 WL 341423 (9th Cir. June 19, 1996) (on passenger seat)

United States v. Gray, No. 95-1197, 87 F.3d 1315, 1996 WL 294455 (6th Cir. June 3, 1996) (on seat)

United States v. Ellis, No. 95-10064, 86 F.3d 1164, 1996 WL 281643 (9th Cir. May 28, 1996) (on floorboard under driver's seat), *cert. denied*, 117 S. Ct. 271 (1996)

United States v. Giraldo, 80 F.3d 667 (2d Cir.) (in secret compartment accessible to some but not others), *cert. denied*, 117 S. Ct. 135 (1996)

United States v. Farris, 77 F.3d 391 (11th Cir.) (in glove compartment), *cert. denied*, 117 S. Ct. 241 (1996)

United States v. Riascos-Suarez, 73 F.3d 616, 623 (6th Cir.) (on driver's side of console), *cert. denied*, 117 S. Ct. 136 (1996)

Immediate accessibility not required: 1st, 4th, 5th, 7th, and 10th Circuits

United States v. Cooke, No. 96-1852, 1997 WL 166290 (7th Cir. April 9, 1997) (laying in bed of pickup truck)

United States v. Carraway, No. 94-1938, 1997 WL 93779 (7th Cir. Mar. 5, 1997) (easily accessible)

United States v. Moore, No. 95-5586, 107 F.3d 868, 1997 WL 71707 (4th Cir. Feb. 20, 1997) (*per curiam*) (somewhere in truck)

United States v. Crosby, No. 96-1114, 107 F.3d 22, 1997 WL 66523 (10th Cir. Feb. 18, 1997) (under front seat)

United States v. Sherman, No. 96-4526, 106 F.3d 394, 1997 WL 51630 (4th Cir. Feb. 10, 1997) (*per curiam*) (in glove compartment)

United States v. Cleveland, 106 F.3d 1056 (1st Cir. Feb. 18, 1997) (in trunk)

United States v. Muscarello, 106 F.3d 636 (5th Cir. Feb. 13, 1997) (per curiam) (in glove compartment)

United States v. Mitchell, 104 F.3d 649 (4th Cir. Jan. 15, 1997) (between front seats)

United States v. Law, No. 96-1139, 105 F.3d 670, 1997 WL 4282 (10th Cir. Jan. 7, 1997) (case does not even say)

United States v. Molina, 102 F.3d 928 (7th Cir. 1996) (secret compartment behind driver's seat)

United States v. Still, 102 F.3d 118 (5th Cir. 1996) (under front seat)

United States v. Ruth, 100 F.3d 111 (10th Cir. 1996) (in unidentified location in car)

United States v. Simpson, 94 F.3d 1373 (10th Cir.) (under seat), *cert. denied*, 117 S. Ct. 411 (1996)

Boykins v. United States, No. 96-2623, 103 F.3d 133, 1996 WL 668535 (7th Cir. Nov. 14, 1996) (within reach), *cert. denied*, 117 S. Ct. 1271 (1996)

United States v. Deases, No. 96-3152, 97 F.3d 1465, 1996 WL 557661 (10th Cir. Oct. 1, 1996) (in trunk), *cert. denied*, 117 S. Ct. 1001 (1997)

United States v. Aldrete, No. 96-3113, 94 F.3d 656, 1996 WL 466658 (10th Cir. Aug. 16, 1996) (wedged next to seat)

United States v. Rivas, 85 F.3d 193 (5th Cir.), *cert. denied*, 117 S. Ct. 593 (1996) (under seat)

United States v. Miller, 84 F.3d 1244 (10th Cir.), *cert. denied*, 117 S. Ct. 443 (1996) (in bag in back of car)

United States v. Ramirez-Ferrer, 82 F.3d 1149 (1st Cir.), *cert. denied*, 117 S. Ct. 405 (1996) (under shirt behind storage compartment, near individual)

United States v. Smith, 80 F.3d 215 (7th Cir. 1996) (on back seat of van)

United States v. Baker, 78 F.3d 1241 (7th Cir. 1996) (under driver's seat)

United States v. Booker, 73 F.3d 706 (7th Cir. 1996) (*per curiam*) (under seat)